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SOME DISPUTED POINTS IN PRIMARY ELECTION LEGISLATION

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The widespread interest in nominating systems, particularly during the last ten years, has given rise to a great number of problems new to American politics. These questions are puzzling the reformer, the practical politician, the lawmaker and the judge. They are of absorbing interest to the student of political institutions and tendencies. It is the purpose of this paper to discuss only three of these problems, namely: the test of party allegiance, the formation of the platform under the direct primary system, and the majority required for nomination.

As the party primary becomes more and more like an election, the more important does the question of party membership become. What constitutes a republican or a democrat? and how shall a satisfactory legal test be made? Originally this was a matter over which the party authorities possessed exclusive jurisdiction, and which they might regulate and control in their discretion. The republican committee decided what evidence was necessary to establish a right to participate in republican primaries, and the democratic committee defined and determined the essentials of democracy. The abuse of this power in many cases led to legal regulation of the party test. The most frequent test required is an expression of intention to support the party candidates in the ensuing election, coupled with a statement of past support of or affiliation with the party. In Michigan the test includes a declaration of sympathy with the objects of the party.¹ In New Jersey, the voter must state that he supported a majority of the party's candidates at the last election, and intends to support the candidates named in the primary.² South Dakota requires previous support of the party, belief in a "substantial part" of principles of the party, and intention to support the candidates

¹ Ch. v, sec. 9, 1905.

² N. J., 1903, ch. 248.

nominated.³ Pennsylvania requires a declaration that the intending voter supported a majority of the party's candidates at the last election.⁴ The Missouri law of 1901 merely required that the voter answer affirmatively the question

Are you a ———?⁵

In some cases an attempt is made to bar those who have already signed a nominating petition, or *vice versa* to prevent those participating in a primary from subsequently signing a petition. In Rhode Island⁶ it is provided that no person shall be entitled to vote

who shall have signed nomination papers of candidates for any elective office to be voted for at the same election as that for which such caucus is being held;

and also that names of those who have participated in any party primary within 90 days, shall not be included in the number necessary to place a name upon the ballot by petition. (Sec. 6.) A similar joker is contained in the Illinois law of 1906,⁷ preventing any one from participating in a primary after having signed a petition of another party or of an independent candidate or from signing a petition after having taken part in a primary. Like provisions are found in other States.

In the Southern States, the general practice is still to leave the determination of the party test to the party officers, although the present tendency is somewhat away from this. A minimum requirement may be embodied in the law, but the party is permitted to add to this in its discretion.⁸ The Mississippi law of 1902 requires the voters to declare that they intend to support the nominations in which they participate, have participated with the political party holding the primary within the two years preceding and are not excluded from such primary by regulations of the party State executive committee.⁹ In Louisiana the voter must declare whether or not he is a member of such political party and whether he will support the nominees of said primary election.¹⁰ In the act of 1900 the

³ S. D., 1905, ch. 107.

⁴ Pa., 1906, ch. 10, sec. 10.

⁵ Mo., 1901, p. 149, sec. 18.

⁶ 1899, 662, sec. 11.

⁷ 1906, p. 450, sec. 33; La., 1900, ch. 33, sec. 15; Minn., 1903, ch. 90.

⁸ See Tenn., 1901, ch. 39; La., 1906, ch. 49.

⁹ Miss., 1902, ch. 66, sec. 9.

¹⁰ La., 1900, ch. 133; 1906, ch. 49, sec. 10.

voters were required to declare that they would not accept appointment from any other party within four years. But additional qualifications may be required by the State central committee. In Florida, however, the party authorities are given complete power to prescribe the terms upon which voters may participate in the primaries, and in no Southern State during this period has the party been deprived of the power to exclude undesirable persons from the primary. The law has laid down minimum requirements, but permitted the party to make its own maximum.

As the question of party suffrage has occupied the attention of legislators for the last ten years, so the registration of party voters has become one of great interest. Starting with no lists at all, advancing to informal party lists, then on to the regular registration books used in the general elections, we find in the latest period the system of party registration introduced. A number of States have provided for such a system: Kentucky in 1892; New York in 1898; Nebraska in 1899; South Carolina in 1900; North Carolina and Connecticut in 1901; Maine and New Jersey in 1903; Iowa, Oregon and Vermont in 1904; and Michigan in 1905 are among the number. The character of these provisions is much the same in all States. At the time of registration the voter is given an opportunity of declaring his party affiliation, if any, which is then indicated in a column of the registry book. A list of party voters is then made up from these preferences, and this serves as their registry list for the ensuing primary election. In New York the declaration of affiliation is secret and the names are not disclosed until after the general election, when the lists are thrown open, and in New York City are printed.

In Maine the declaration of affiliation may be filed with the town clerk.

I ——— being a legal voter of ——— hereby elect to be enrolled as a member of the ——— party.¹¹

In Vermont, a certificate is given to voters, reading as follows:

It is my intention to act and vote with the ——— party at the coming election.¹²

This certificate may be attached to the inventory for tax purposes, but is furnished all voters, whether tax-payers or not. If the voter does not return the certificate, he is ineligible to vote in the caucus,

¹¹ 1903, ch. 214, sec. 2.

¹² 1904, ch. 2, sec. 4.

In North Carolina and South Carolina the registration provided is to be made entirely under party rules and regulations. The law merely requires that there shall be some system of registration.

In such laws, provision is made for transfer of enrollment from one district to another upon change of residence; and in New York for a number of years a supplementary enrollment was provided. This latter has, however, been abolished.

In a very few instances during this period, the party test has been abolished altogether. The California law of 1899 contained a provision which enabled the voter to cast a ballot for either party, without divulging his party preference. This clause was subsequently declared unconstitutional, however.¹³ A similar provision was contained in the Oregon law of 1901, which was also declared unconstitutional. The Minnesota law of 1899, provided for the open primary, but in 1901 this feature was abandoned. In the Wisconsin law of 1903, absolute secrecy of the ballot is secured, and the voter may vote for candidates of whichever party he may choose. Of course, he cannot vote with both parties at the same time.¹⁴

It is urged in favor of this plan that it protects the secrecy of the ballot; that it makes intimidation or undue influence impossible; that the requirement of a partisan test is both unnecessary and useless; and that the test of allegiance excludes only the honest citizen while admitting the dishonest and corrupt. It is objected, however, that without some sort of party test, the responsibility of the party for the character of the nominations made or of the platform adopted is entirely broken down. Members of the republican party may assist in the nomination of weak democrats, or *vice versa*; and unscrupulous leaders may readily transfer blocks of voters without regard to party lines. When a corrupt machine is threatened by the nomination of an aggressive reformer, it is possible to avert this menace by the use of available numbers of the other machine. In these ways, it is held, the responsibility of the party may be completely destroyed, or, at any rate, seriously crippled, and reform movements may be made more difficult.

On the whole, if any test is required, it would seem sufficient to exact from the voter a statement that he is in general sympathy with the principles of the party and that he intends to support its

¹³ See *Britton v. Board of Election Commissioners*, 61 Pac., 1115, 1900.

¹⁴ Where the commission plan of government is adopted in Iowa, a non-partisan primary is provided. Iowa, 1907, ch. 48. See also Wisconsin, 1907, ch. 670.

candidates generally at the next election. This eliminates the period of probation and permits the voter to pass freely from one party to the other as conditions or circumstances change. The system of party enrollment or registration seems to lay undue stress on the rigidity of party organization, although this may be to some extent offset by liberal provisions for supplementary enrollment or change of party registration. The chief objections to this system would then disappear, but also its chief merit, namely, that of keeping out the unwelcome and unscrupulous invaders of the party. This illustrates very well the inherent difficulty in all tests, namely, that of letting down the bars for the honest, independent voter without admitting, at the same time, the dishonest and the venal. It appears, then, that no solution of the problem of party test has yet been reached and that much more practical experience and much more mature reflection will be necessary before the proper sort of a regulation can be devised.

In framing direct primary laws, an important problem arises in connection with the formation of the party platform. With the abolition of the delegate convention, the representative body of the party, how shall the declaration of party principles be drawn up? What shall be substituted for the present authority? How shall the declarations of such an authority be made binding? In local areas, where direct primaries have chiefly been tried and where differences in principle are rare, the question of the platform has not occasioned serious trouble. In larger districts, like States, however, the question becomes more important for, although distinct State issues are not so common as State campaigns, there are occasionally serious divisions of opinion in State elections and for such emergencies provision must be made in the law.

Several answers have been given in the various States. In Wisconsin provision is made for the formation of a State platform by a candidates' convention.¹⁵ This body is made up of all the party candidates for State office and for the legislature, together with the hold-over members of the State senate. In this way members both of the legislative and the executive departments may be committed to a definite party policy, and this party policy formally presented as the platform. In Missouri the law provides for the formulation of the platform by the State central committee acting with the party nom-

¹⁵ 1903, ch. 451.

inees for State office, for congress, and for the legislature.¹⁶ In North Dakota the platform is framed by the State central committee with the candidates for State office.¹⁷ Still another method is found in Nebraska, where each county committee elects one delegate and the delegates so chosen meet and frame the party platform.¹⁸ In Texas another plan is provided.¹⁹ On petition of 10 per cent of the party voters, any question of policy must be submitted to the voters of the State at the primary and, if approved by a majority, becomes a part of the platform of the party. It is also provided that no convention shall place in the platform or resolutions of the party they represent any demand for specific legislation on any subject, unless the demand for such specific legislation shall have been submitted to a direct vote of the people, and shall have been endorsed by a majority vote of all the votes cast in the primary election of each party. Provision regarding a party referendum was contained in the Oregon law of 1901.²⁰

More commonly, however, the platform is formed by the candidate or candidates themselves. This is the general method employed in local campaigns throughout the South, and in the State campaigns of Washington and Oregon in the North. In the Oregon law, express provision is made for declaration by the candidate of the principles upon which he stands in not exceeding one hundred words and twelve words are permitted to be printed upon the ballot.²¹ But where no legal provision is made for such a declaration upon the ballot, the candidate may of course make such a statement the basis of his campaign. The shaping of the platform by the candidate seems, all things considered, best fitted to survive. Where there is a serious difference of opinions as to policies, the platform is likely under any system to be shaped by the dominant group and will be practically the program outlined by this faction in its fight before the primary election. Generally such issues are as clearly and as sincerely defined during the primary as they would be in the platform framed by the

¹⁶ 1907, p. 263.

¹⁷ 1907.

¹⁸ 1907, ch. 52.

¹⁹ 1907, ch. 177.

²⁰ See Nebraska, 1907, ch. 52, sec. 35.

²¹ 1904, sec. 12—"If I am nominated and elected, I will, during my term of office (here the candidate, in not exceeding one hundred words, may state any measure or principle he especially advocates and the form in which he wishes it printed after his name on the nomination ballot, in not exceeding twelve words.)"

convention, for it should not be forgotten that the average party platform is verbose and perfunctory and often serves no real purpose, since the elections are usually conducted upon the basis of national issues. Where there is no living issue of a local character, it is not likely that the question will be obscured or befogged because of the failure of the party convention to elaborate its position on other questions.

In case definite machinery is provided, the Wisconsin plan seems to possess some merit. The party program is made, under this system, by those who, if elected, are to carry it out; and the majority might reasonably be held to bind the minority. The platform is made after the candidates are chosen, however, and in case of an unwilling candidate, there would be no effective way of securing acquiescence in the program, either before or after the election. As compared with a platform framed either wholly or in part by the party committee, the candidate convention is far superior. Party committeemen are chosen to manage campaigns and conduct organization business, and not for their opinions upon questions of public policy or their ability to frame statements of public policy.

Under a system which provides for the selection of candidates by direct vote, the percentage of the total vote necessary for a choice is a subject of considerable importance. The common plan throughout the North and West is to require merely a plurality vote. The candidate receiving the highest number of votes is made the nominee. In the Southern States a clear majority is usually required and when no candidate receives the necessary vote, a second primary is held, in which the two leading candidates participate.²² As another alternative, it may be provided, as in Illinois²³ (1905) that in case no candidate receives a majority of all the votes cast, a convention shall then make the selection. In recent years, provisions have been made requiring the candidate to secure a minimum percentage of the votes cast; thus in Michigan, 40 per cent is required, in Iowa 35 per cent. Under the Michigan plan, if 100,000 votes are cast, there is no nomination unless some candidate receives at least 40,000 votes. If no choice is made then the convention must select the candidate.

²² See also Michigan, 1905, ch. 476; special acts:

²³ Applied to county offices, 1905, p. 227; In North Dakota, 1907, no nomination is made unless the total vote cast for candidates for a given office equals thirty per cent of the total party vote for secretary of state at last election.

Finally, a system of preferential vote has been advocated. Under this plan the voter indicates his first and second choices for the office and, in case no candidate receives a majority of first choices, the lowest candidate is dropped and his second choices are then distributed. This plan has been approved in Wisconsin by Governor LaFollette, but not accepted by the legislature. A modified form of it has been adopted by the State of Washington in 1907. Where there are more than four candidates for a State or congressional office, each voter is required to indicate first and second choice. If no candidate receives 40 per cent of the total vote, second choices are then counted in and a decision reached in this way.²⁴

In the South the second primary, necessitated by the requirements of a majority for nomination, occasions no particular difficulty and the system appears to work very well. As there is really but one party and as the regular election is generally perfunctory, the second primary is usually well attended. In fact, this second primary, when held, is in reality the election. In other sections of the country, where the party system is in vogue, it is not likely that the second primary is practicable. The number of elections is already so great that an additional primary would probably be poorly attended and the results unsatisfactory. The difficulty of securing a full and representative vote is already so formidable that no new complication should be added. In many instances, the second primary would involve the holding of two primaries and an election in the spring, followed by two primaries and an election in the fall;—a situation which seems to favor the professional politician, rather than the general public.

Choice by convention, in case no candidate receives a majority, is a compromise favored by those who believe that in this way the advantages both of the direct vote and of the delegate system may be retained. Where there is a strong sentiment in favor of any candidate, it is argued, he will be nominated, while the advantage of the deliberative body or convention will be preserved. On the other hand, it may happen that a candidate will fall slightly short of the necessary majority, and, although far in the lead of his nearest competitor, secure relatively few delegates, and fail to be chosen by the convention. There is also danger that candidates may be presented

²⁴ Laws of 1907, ch. 209, sec. 18 and 23. In Alpena county, if no candidate receives 25 per cent of the vote, a second primary is held; 1905, ch. 476, special acts.

with the deliberate purpose of so splitting up the vote that no one of them will receive a majority and that the choice will consequently devolve upon the convention.

The preferential system is designed to obviate the necessity for a second ballot and at the same time to prevent the choice of a candidate by plurality only. It is also intended to meet cases where a majority as to a policy is divided as to a candidate, and is likely to be overridden by a minority united on a single candidate. Thus an anti-machine group may muster 50,000 votes as against 30,000 machine supporters, but if the reform votes are divided between the two candidates, the solid vote of the organization will place the candidate of that faction in nomination. The preferential system is somewhat complicated, however, especially where two or more candidates must be selected for the same grade of office,²⁵ and is not likely on this account, to win very general opinion. The ballot is still somewhat of a mystery to the general public and additional requirements are not likely to meet with general favor. It seems likely that the public will accept the plurality system before it is reconciled to the complications of the preferential plan.

A plurality system may at times embarrass a reform movement which possesses more candidates than the "machine," but the preferential system would enable the opposition to work mischief in the distribution of second choices. Rivalry and jealousy might easily be fostered and choice actually made between two promising reformers by the machine. If, for example, A, the machine candidate, has 5000 votes, and B and C, reform candidates, 4000 each, the second choices of the machine group might nominate either B or C.

The most common method of nomination is the choice by simple plurality vote. This is the ordinary method outside of the Southern States, and, in general, has proven satisfactory where employed. The objection frequently urged is that it makes possible the choice of a candidate by a small faction of the party decidedly in the minority. If there are six candidates, for example, and the vote is somewhat evenly divided, it is possible that the highest candidate may receive not more than 17 per cent of the total vote cast. Thus 17,000 votes out of 100,000 might choose the party candidate. In short, the argument is that there is not a sufficient guarantee that the successful candidate really commands sufficient general support in the party

²⁵ Nomination of representatives in Illinois, aldermen in Boston, etc.

to warrant his choice as its representative. Where the system has actually been employed, however, these objections are not generally held. In practice the result of the primary is accepted by the several contestants with as good grace in the case of a plurality as of a majority. The number of candidates is, as a rule, not so great as might be expected and, where any really important issue is involved, the list is likely to be narrowed down to two. Where there is no overshadowing issue and the sole question involved is the personality of the candidates, a plurality nomination need not arouse any antagonism or division in the party.

A modification of the plurality system is the minimum percentage plan now used in Michigan where 40 per cent is required for governor and lieutenant-governor, and in Iowa where 35 per cent is necessary to a choice. In both cases, nomination by convention is the alternative. This plan is open to the same objections as apply to the majority scheme, namely the possibility that the leading candidate at the polls may be beaten in the convention; and that dummy candidates may be put up for the purpose of so dividing the vote that choice must be made by the delegates. The lower the percentage, however, the less is the likelihood that choice will not be made by the voters in the primary and the less the opportunity for such manoeuvres.

On the whole, it seems probable that the simple plurality will probably be adopted outside of the Southern States, where peculiar conditions prevail. Experience has shown that this is a satisfactory system, and that it neither destroys nor disrupts the party. The demand for a majority primary or a minimum percentage is generally based on unfounded apprehension, rather than upon reason or experience. It ignores the fact that the number of candidates under the direct primary system is not ordinarily great and that where the number is large the custom soon teaches acquiescence in the nomination of the leading candidate in the primary just as it does in the general election. Originally choice by majority vote only was the general rule, even in elections, but now a plurality is accepted and indeed never challenged. It is likely that the same process of development will take place in the party primary.